UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:

STUDENT TRANSPORTATION OF AMERICA
Employer
and **Case 04-RC-113131**
INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, LOCAL 115
Petitioner

PETITIONER'S EXCEPTIONS TO HEARING OFFICER'S REPORT ON CHALLENGES AND OBJECTIONS

Pursuant to the Board's Rules and Regulations, Section 102.69, the Petitioner hereby files these Exceptions to the Report of the Hearing Officer on the Challenges and Objections issued on June 18, 2014 by the Honorable Ira Sandron, Administrative Law Judge. On March 13, 2014, the Regional Director of Region 4 issued a notice of hearing on challenged ballots and objections to the election, and the Judge Sandron conducted the hearing in this matter as the designated Hearing Officer[1], from April 8–10, 2014, in Philadelphia, Pennsylvania.

The Tally of Ballots, showed the following results:

Approximate number of eligible voters	64
Void Ballots	0
Votes cast for Petitioner	24
Votes cast against participating labor organization	23
Valid votes counted	47
Challenged Ballots	11
Valid votes counted plus challenged ballots	58

As set forth below in more detail, the Petitioner requests review on all issues that were at issue before the Hearing Officer, (a) the determination the challenge to the ballots of Matthew Smith and Traci Williams should be overruled and (b) that the Hearing Officer overruled all of the Petitioner's

[1] References herein shall refer to Judge Sandron as the Hearing Officer.

Objections.[2] With respect to the determination on the challenge to the ballots of Traci Williams and Matthew Smith and the overruling of Petitioner's Objections, the Petitioner requests review on the basis that as a matter of law the decision is inconsistent with Board precedent and the Hearing Officer's Decision on a variety of factual issues are "clearly erroneous."

Summary of Evidence

Student Transportation of America (STA, herein referred to as either STA or the Employer) is a Delaware Corporation engaged in the transportation of students of the Bristol Township School District (P-11)[3] from its facility located at its 6403 Mill Creek Road Levittown, Pennsylvania.

On September 11, 2013,[4] Petitioner filed a Representation Petition with the NLRB seeking to represent certain employees of the Employer at its Levittown facility. A Secret ballot election was originally scheduled for October 23 but as a result of the October 2013 partial government shutdown, the election could not be conducted on October 23, the date set forth in the Stipulated Election Agreement. Following the shutdown, the parties verbally agreed with the approval of the Regional Director to reschedule the election to November 14. The original payroll eligibility period remained the same. At the hearing, the parties agreed at the start of the hearing the only ballots still subject to challenge are Matt Smith, John Evans, Rebecca Kurtz and Traci Williams. The Employer contended all of the challenged voters were eligible to vote. The Petitioner claimed that the challenges to all four votes should be sustained.

The second issue related to the dismissal of the following objections set forth below.

1.[5] The Employer' utilized a supervisor, Traci Williams as their election observer and based on her duties related to the employer's operations, and other employees could reasonably view her as an individual closely identified with management, despite being requested by the Board agent after the Petitioner objected to her at the pre-election conference to use another person.

2. The Employer election supervisor electioneered/and or conveyed to voters at the polling place by wearing a shirt from the Employer the type of shirt that is only worn by STA supervisors and management, that the Employer's management was monitoring the secret ballot voting.

---

[2] Petitioner is only excepting to the Hearing Officer's overruling of Objections 1, 2, 5, 8 and 9.

[3] NT refers to the page number of the Notes of Testimony of the Hearing. B-refers to Board Exhibits; P refers to Petitioner Exhibits followed by the number .E-refers to Employer exhibits followed by a number. R followed by page number refers to Report on Challenges and Objections.

[4] All dates herein are 2013 unless otherwise noted.

[5] Petitioner is not excepting to dismissal of Objections 3 and 4

5. Rebecca Kurtz employees closely aligned with management and/or supervisors of the Employer. Before and after voting, they stood out where the line of voters was waiting to vote instead of leaving the polling area they engaged in prolonged conversations with these voters.
6. Before and during the election, as the Petitioner attempted to leaflet and speak with potential voters before they went inside to vote, John Carey, a management representative, maintained a nearby presence, thereby interfering with their conduct and giving the impression of surveillance.
8. At meetings with employees on about September 25 and the first week of October concerning the election, Tim Krise, STA's Pennsylvania Vice-President, threatened that if the Petitioner won, STA could walk away from its contract with the Township.
9. At the September 25 meeting, Krise mentioned a Christmas bonus to employees at the facility, even though they had never before been notified of such a benefit.

The Hearing Officer dismissed all of the Petitioner's objections.

Both parties presented evidence as to the challenged ballots. The Petitioner and the Employer presented witnesses and exhibits regarding the status of the challenged employee ballots.

Issues

1. Whether the Hearing Officer applied the proper test in determining the Petitioner's challenge to the ballot of Matt Smith?
2. Whether the Hearing Officer applied the proper in determining the Petitioner's challenge to the ballot of Traci Williams?
3. Whether the Hearing Officer erroneously found that Traci Williams was a proper person to serve as an observer for the Employer, given her close alignment with the management of the Employer, when he overruled Petitioner's Objection number one?
4. Whether the Hearing Officer was incorrect when he found that Traci Williams wore a shirt with the Employer's logo while she was serving as the Employer's observer at the election when he overruled Petitioner's Objection number 3?
5. Whether the Hearing Officer was incorrect when he found that Rebecca Kurtz, a person he found not eligible to vote in the election, interfered with the election when she stood in line conversing with voters waiting to vote when he overruled Petitioner's Objection number 5

6. Whether the Hearing Officer applied the proper test when he overruled Objection 6, when he found that John Carey's close proximity to the Petitioner and its representatives that were hand-billing employees on the day of the election?

7. Whether the Hearing Officer applied the proper test when he found that the Employer's discussions about "walking away for the contract" and a Christmas bonus at a meeting with approximately half did not constitute objectionable conduct warranting a new election.

8. In general as to all of the objections, whether the Hearing Officer applied the proper test to determine if a party's misconduct has the tendency to interfere with employees' freedom of choice, in the instant case?

Challenged Ballot of Matt Smith

The Hearing Officer was incorrect in not sustaining the challenge to Matt Smith's Ballot. Here again, the Hearing officer noted that, "Matt Smith was internally consistent but noticeably defensive, even irritable, at times, especially when answering questions regarding when he received his training and receipt of the "S" endorsement required to drive buses with students aboard.

In the case, the Employer called into question the conclusiveness of its own payroll and time records from the beginning of the school year up to September 20. Woods testified that daily driver logs kept for this period were at best incomplete (NT-620). The assumptions of the Hearing Officer (R-10) are not correct nor should they be relied upon in determining the challenge to the ballot of Matt Smith. In Harold J. Becker Co., Inc. 343 NLRB 51, (2004), the Board adopted the hearing officer's findings and recommendations sustaining the challenges to 21 ballots based on the inconclusiveness of the employer's records. In Becker, supra the employer relied on anecdotal evidence to establish the amount of time various employees did other work for the employer. The Board rejected this approach. Woods testifying on direct "has cast doubt upon the reliability of its vague, albeit uncontradicted, estimates of the amount of time the disputed employees spent performing unit work during the relevant period." Id at p. 54.

If a determination of the status of the employees cannot be made under the Board's dual function analysis, because of the inconclusiveness of the Employer's records, the analysis of whether these four challenged ballots should be excluded must be done under a community of interest test using traditional principles of unit determination.

The test that is applicable is set for in Specialty Healthcare & Rehabilitation Center of Mobile, 357 NLRB No. 83 (2011), enfd. Kindred Nursing Centers East, LLC, dba Kindred

Transitional Care and Rehabilitation–Mobile, fka Specialty Healthcare and Rehabilitation Center of Mobile, v. NLRB, 727 F.3d 552 (2013). The Board in Specialty found employees in a bargaining unit must have "**an overwhelming community of interest between the included and excluded employees.**" Id. slip op.at 11. See also DTG Operations, Inc., 357 NLRB No. 175 (2011) and Value City Furniture, 2014 WL 1321039 (NLRB.), (April 3, 2014).

The Hearing Officer failed to proper consider Board precedent and the facts in overruling the challenge to Matt Smith's ballot. Therefore, the challenge to the ballot of Matt Smith should be sustained.

Challenged Ballot of Traci Williams

The Hearing officer did not find Williams as a credible witness when he noted the following,

> "Williams was frequently evasive in answering questions, and her testimony contained several internal contradictions suggesting, as with O'Donnell, that she was trying to slant her testimony. For example, she first testified that her job duties did not change from August 28 until the election (November 14) but then testified that they changed in October. When I asked her if she dispatched (prior to November 14), she gave the contradictory answer: "No, I did not actively sit at that desk, no. I would cover, I would help, yes." Williams also was evasive in answering whether she had her own office, first saying no, that she was in a work area, but later testifying that she had an office next to Evans by the time of the election. In contrast to her testimony, Petitioner's Exhibit 25, stipulated to be the office layout from August 28–November 14, reflects that she had an office during that period." (R-4)

Despite his findings concerning her credibility, the Hearing officer ignored the documentary evidence in the record that contradicted her testimony and dismissed the challenge to her ballot. Williams, as early as the September 2013, received holiday pay. Williams received holiday pay for the Labor Day Holiday (P-23, 4 of 9) as did Evans (P-15 2of 6) and Kurtz (P-20, 2of 5). The Employer attempted through Woods to dismiss the holiday payment to Williams as a mistake[6] (NT-691). However, no attempt was made to recoup the holiday pay that Williams received by mistake. The record is devoid of any other drivers that Petitioner sought to represent as being paid for the holiday (P-1, P-2 and P-3).

[6] Woods did admit she prepared the payroll for that week. (NT 692)

The records submitted by the Petitioner and the Employer confirm that Williams as early as September 2 was accumulating paid time off (PTO) per STA's policies. The records further reveal from September 2 to October 4, Woods was regularly signing off on the payroll time sheets for this period (E-15 2of 5 through 3 of 5). These benefits of holiday pay and accumulation of PTO that Williams received took place months l before she signed her offer letter dated October 31 (E-14). The drivers sought in the bargaining unit do not receive PTO or holiday pay (P-5). The Employer never explained why Williams was accumulating PTO time during this same period (E-15 pg. 1 and 2 of 5) and the different rate of pay. The Hearing Officer even noted that Williams had the option of receiving reimbursement for use of her personal cell phones for STA business. (R-11).

Williams does not share a community of interest with regard to her pay and benefits as to the other drivers included in the bargaining unit. After the Hearing Officer had determined William performed driving duties and found her to be a dual function employee, however he failed to consider whether Williams shared a sufficient community interest with the other members of the proposed bargaining unit as required by Board precedent. The Board, citing Berea Publishing Co., 140 NLRB 516 (1963) expressly described its policy as permitting inclusion of a dual-function employee in a unit "if he performs duties similar to those of unit employees in sufficient degree to demonstrate that he has a substantial interest in the unit's wages, hours, and working conditions." Wilson Engraving Co., at 252 NLRB at 334. Petitioner submits the Hearing Officer failed to consider Williams's community of interest with the other drivers in the bargaining unit.

The Hearing Officer did not properly consider the fact that all of the STA drivers early in the school year were notified by a posting from the Employer that if they had to call off they should contact certain people. The document includes Frank Koziol's name presumably prepared after the school year began up to and including Koziol's termination. The list also includes the names of John Evans, Becky (Rebecca) Kurtz and Traci Williams (See Hansell, (NT 62 & P-6). The Hearing Officer excluded Evans and Kurtz and did not exclude Williams. This finding does not make sense under the circumstances. All three individuals in question have their cell phone numbers posted along with office telephone numbers with assigned extensions and STA email addresses. No other drivers sought by the Petitioner were shown to have either Employer provided emails or phone extensions with STA. The Hearing Officer found that from August 28 on, all three (Evans, Kurtz and Williams) attended planning meetings with the STA terminal manager, Bradin, and Alford. In the Township Community Report, a

24-page document, there is a photograph of the three of them, described as STA "support staff," with Bradin. (P-18 at page 20), (R-11).

The Hearing Officer found, "The lack of documentation concerning Williams' hire seems rather odd considering the large-scale nature of the Employer's business." (R-13). Despite this finding of fact, and the fact that Williams from the very beginning of her employment received the same pay and other benefits accorded Evans and Kurtz, the Hearing Officer incorrectly dismissed the challenge to her ballot. Petitioner for the reasons set forth above would submit that the challenge to the ballot of Traci Williams should be sustained.

Objection No. 1

During the election, the Employer utilized Williams as its observer despite the Petitioner's objection.

In a single sentence, the Hearing Officer dismissed this Objection. This cursory treatment of this objection defies the earlier questions raised by the Hearing officer credibility findings he made regarding Williams.

The Employer through its actions prior to the election had imbued Williams as having authority over the other drivers. The Employer has placed Williams in a position in which she could reasonably be viewed by the other employees as closely identified and/or aligned with management.

The Hearing Officer departed from Board law. Specifically, the test for determining whether an individual properly may serve as an observer is not solely limited to an inquiry into whether the individual is a statutory supervisor, but it also includes an inquiry into whether the individual is closely identified with the employer. Peabody Engineering Co., 95 NLRB 952 (1951); Watkins Brick Co., 107 NLRB 500 (1953). An employee, who has none of the authority vested in supervisory personnel, may still be closely identified with management if he or she relays information to employees and has been placed by management in a strategic position where employees could reasonably believe that the employee speaks on its behalf. B-P Custom Building Products, 251 NLRB 1337 (1980); River Manor Health Related Facility, 224 NLRB 227 (1976), enfd. 559 F.2d 1204 (2d Cir. 1977). It is established Board policy that persons closely identified with management may not act as employer observers. First Student Inc. , 355 NLRB 410, (2010), BCW, Inc. d/b/a Sunward Materials, 304 NLRB 780(1991),

The issue of Williams acting as the observer for the Employer was timely raised by the Petitioner with the Board agent at the pre-election conference. The Board Agent requested the Employer to change its observer, but the Employer refused to do so.

Objection 2 that follows is related to this Objection. The fact that Williams wore a shirt only worn by STA managers, and supervisors created the fortified the employees' impression of Williams as an individual who is closely identified with management.

While the Hearing Officer referred to the standard to be applied in determining the validity of objections when there is a close election. His decision fails to apply the law to the facts of this case. In Cambridge Tool Mfg. 316 NLRB 716, the Board held the test to determine if a party's misconduct has the tendency to interfere with employees' freedom of choice, the Board considers the following: (1) the number of incidents, (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election; (5) the degree to which the misconduct persists in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party.

In light of this erroneous application of law and disregard of the relevant facts, the Board should decline to adopt the Hearing Officers recommendation to overrule Objection 1.

Objection 2

During the election, Williams wore a shirt that was worn only by STA supervisors and management.

Relate to Objection 1 is that while serving as the Employer's observer, Williams wore a shirt only worn by STA's managers and supervisors the Hearing Officer incorrectly found that the challenge the ballot of Traci Williams should be dismissed, the Petitioner would assert that the dismissal of this challenge was also incorrect. At the pre-election conference Argeros also objected to the fact Williams was wearing a shirt with STA insignia. Hansell, Argeros, and Pease all testified that they observed Williams was wearing a black polo shirt with the STA logo

on it. Argeros raised this issue with the Board agent, but there was no attempt to correct the situation.

Williams denied she wore or possessed shirt with the STA logo. However, the Hearing Officer discredited her and found she did wear a shirt with the STA logo. The election in this matter is a close vote 24-23 with four votes subject to challenge and the challenges are determinative to the results of the election. The closeness of the election is a paramount factor in assessing objections. SNE Enterprises, Inc., 348 NLRB No. 69 (2006) at 4 n.9, citing Robert Orr-Sysco Food Services, 338 NLRB 614, 615 (2002). "The Board gives great weight to the closeness of the election in deciding whether conduct is objectionable." Hopkins Nursing Care Center, 309 NLRB 958, 959 n.8 (1992) (citing cases.) Conduct that might not have warranted setting aside a lopsided election result will be objectionable in a close election. See Double J Services, 347 NLRB No. 58 (2006) at 2-3.

Section 11326.1 of the Representation Case Handling Manual provides that all observers wear the official observer badge provided by the Board. The section goes on to provide: "It is preferred, but not required, that [the observers] wear no other insignia." Similarly, Section 11310.4 provides in similar language, "The official badge to be worn by the observers is the one provided by the Board. It is preferred, although not required, that no other insignia be worn by the observers during their service as observers."

Section 11326.3 of the Representation Case Handling Manual includes the wearing of insignia within the definition of electioneering. The provision specifically reads: "**Voters need not remove insignia, even though they constitute electioneering material.**" (Emphasis added.) Immediately preceding this definition, the Manual states at section 11326.2, "Election observers may not electioneer during their hours of observer duty, whether at or away from the polling place." Since observers may not electioneer, and since wearing insignia constitutes electioneering, the wearing of insignia by an observer while engaged in official observer duties, is electioneering, and therefore the conduct is per se objectionable conduct. This contradicts the equivocal existing policy of requesting, but not requiring, official observers from wearing campaign materials while acting as observers.

The Board, has traditionally held that the mere wearing of clothing identifying a party to an election does not rise to the level of objectionable conduct that would warrant the setting aside of the election. However, in a footnote to the Board's decision in U-Haul of Nevada, Inc.,

341 NLRB 195 (2004), former Chairman Battista and Member Schaumber noted, that inasmuch as Board policy discourages this type of electioneering conduct by observers, to give meaning to the policy, it should clearly prohibit the wearing of identifying insignia by observers.

Petitioner asserts that in the instant case given the closeness of the election when determining whether the objections in this case should be sustained depends on the test, that is an objective one, it is whether the conduct of a party to an election has the tendency to interfere with the employees' freedom of choice. Petitioner herein submits there can be no de minimis conduct in a close election. Any objectionable conduct in the instant case did interfere with the results of the election, warrants a new election. Cambridge Tool & Mfg. Co., Inc., supra.

In light of this erroneous application of law and disregard of the relevant facts, the Board should decline to adopt the Hearing Officers recommendation to overrule Objection 2.

Objection 5. During the election, Kurtz stood outside of the polling area and engaged in prolonged conversations with those waiting to vote.

The Hearing Officer found that Kurtz remained in line talking to voters for a period of about one half hour after the polls opened. The Hearing officer also found that Kurtz was not eligible to vote on the day of the election.

At the hearing it was established through the testimony of both Kurtz and employee Barbara Hansell, that just before the polls opened and about a half hour after the election was underway, Kurtz, the Employer's admitted dispatcher remained in line and spoke with voters who were standing before her and behind her. Kurtz testified that instead of voting immediately she remained in line talking to voters for a period of about one half hour after the polls opened.

However, despite all of this testimony the Hearing Officer did not find that her conduct constituted objectionable conduct. The Hearing Officer found her job duties consisted of assisting the manager in all driver disciplinary matter. (R-14). Kurtz has sat in on the discipline of employees and signed her name under the Kelly Woods signature (P-22 1 through 4). The very fact that she did not do this until October but before the election is relevant to the consideration to how other employees would be perceive her status as a manager.

Even in the face of this, evidence the Hearing Officer found to the contrary that she was not a managerial employee or (could) reasonably perceived to be such. This finding is contrary to the evidence, by sitting in on the discipline of employees with the terminal manager and

signing her name under the terminal manager to the discipline records this would lead other employees reasonably to believe that Kurtz is aligned with management.

The Hearing Officer did not correctly apply Board precedent in his analysis of this conduct. There does not need to be any analysis of the content of the conversation. Under Milchem,170 NLRB 362, an election will be set aside if a party to the election engages in prolonged conversation with prospective voters waiting in line to cast their ballots, regardless of the content of that conversation. See also Lowes HIW, Inc., 349 NLRB 478 (2007). Conduct such as this will result in the setting aside of an election. Under the Milchem analysis, Kurtz was acting as a representative of the Employer through her conduct of standing having conversations with the voters for a period of one half hour. This conduct constitutes a prolonged conversation with voters. The "final minutes before an employee casts his vote should be his own, as free from interference as possible." Milchem, supra. at 362.

In light of this erroneous application of law and disregard of the relevant facts, the Board should decline to adopt the Hearing Officers recommendation to overrule Objection 5.

Objection 6 Before and during the election, as the Petitioner attempted to leaflet and speak with potential voters before they went inside to vote, John Carey, a management representative, maintained a nearby presence, thereby interfering with their conduct and giving the impression of surveillance.

Petitioner's witnesses, O'Donnell, Frank Pease and Argeros all testified that John Carey[7], interfered with the Petitioner's rights to leaflet and speak with potential voters during the morning of the election. Carey purposely placed himself within 5-10 feet of the Petitioner's engaged in peaceful conduct. His presence caused STA employees to avoid these individuals and his conduct interfered with the Petitioner's rights. An employer may observe open union activity on or near its property, "an employer may not do something 'out of the ordinary' to give employees the impression that it is engaging in surveillance of their protected activities." Loudon Steel, Inc., 340 NLRB 307, 313 (2003) . Carey's actions in this case were undoubtedly out of the ordinary in this case. The case cited by the Hearing Officer do not involve observation on the very day of the election. The Hearing Officer incorrectly relies on Partylite Worldwide, Inc.,

[7] He is involved in acquisitions and mergers for STA and gets involved in STA startup projects including the BTSD (NT 494).

344 NLRB 1342 (2005) for the proposition that Carey's conduct was not objectionable conduct. In Partylite, the Board found that the employer engaged in objectionable conduct when it had a number of high ranking management officials stationed at it premises observing the hand billing activities of the Petitioner with the critical period. It is unclear rom the facts of Partylite, id. but it does not appear that the employer's conduct occurred on the very day of the election when the polls were open as it did in this case. In a recent case, Intertape Polymer Corp., 360 NLRB No. 114, (May 23, 2014), the Board relying on Partylite, found "The presence of supervisors at the plant gate where employees arrived and left was itself unusual and "out of the ordinary" to give the impression of to the employees that the employer was engaged in surveillance of their protected activities.

Query: What is ordinary conduct by the Employer on the day of a secret ballot election? Is an employee of management for the Employer standing directly near the Petitioner's representative, Charlie Argeros, as to clearly interfere with the Petitioner's hand billing is not ordinary conduct? Even the Hearing Officer noted that employees stopped coming over to where Argeros and Carey were standing to get handbills[8] (R-21). The facts of the instant case given the close proximity Carey chose to stand to the Petitioner's representatives makes his conduct "out of the ordinary."

Additionally, Petitioner submits that "conduct that is otherwise unobjectionable can disturb laboratory conditions if it occurs during, or immediately before, the election.", See Kalin Construction Co., 321 NLRB 649, 651 (1996) The Employer in this case did not even have Carey attempt to explain his conduct once it has been shown the conduct was questionable and out of the ordinary. Carey's testimony did not specifically deny the allegations contained in this Objection.

In light of this erroneous application of law and disregard of the relevant facts, the Board should decline to adopt the Hearing Officers recommendation to overrule Objection 2.

Objections Nos. 8 and 9

No. 8: At meetings with employees on about September 25 and the first week of October concerning the election, Tim Krise, STA's Pennsylvania vice president, threatened that if the Petitioner won, STA could walk away from its contract with the Township.

[8] Report on Challenges and Objections, herein referred to as R followed by page number

No. 9: At the September 25 meeting, Krise mentioned a Christmas bonus to employees at the facility, even though they had never before been notified of such a benefit.

Barbara Hansell testified that she attended numerous meetings held by the Employer prior to the election wherein issues about the Union were discussed. According to Hansell, approximately 25-30 employees were present at this meeting. Tim Krise, who is the Vice President of STA in Pennsylvania (NT. 565) served as the main speaker at this meeting. Krise during a meeting in September 25, 2013, mentioned to employees present at the meeting that if the Union won, STA would walk away from its contract with BTSD (P-11)[9]. Why did Krise bring up the subject about walking away from the BTSD if the Union won? Whatever Krise's real intention was during the speech, it does not matter, his message came across loud and clear to the employees that if the Petitioner won the election, STA could and would seek to terminate its contract with BTSD.

The Supreme Court has held, employees are "particularly sensitive" to threats of plant closure, and such threats are among the types of unfair labor practices that "destroy election conditions for a longer period than others." NLRB v. Gissel Packing Co., 395 U.S. 575, 611 fn. 31 and 619-620 (1969). Further, the fact that the threat was made by Krise, a high-ranking official of the Employer, serves to heighten its severity. Cartridge Actuated Devices, 282 NLRB 426, 428 (1986). In addition, the threat to close was made to 20 employees, nearly one-third of the voting unit. This factor is particularly significant when viewed in light of another relevant factor, i.e., that the election was decided by fewer than at best five votes.[10] See, e.g., Hopkins Nursing Care Center, 309 NLRB 958, 959 fn. 8 (1992). A threat of plant closure constitutes objectionable conduct warranting setting aside the election. Glasgow Industries, 204 NLRB 625 (1973); General Electric Wiring Devices, 182 NLRB 876 (1970).

---

[9] The actual language contained in the contract provide that BTSD would agree that it would offset 50% of Contractor's actual additional labor costs resulting from a unionization drive or a new collective bargaining agreement with a union applicable in the first year of this Agreement. Pg. 32

[10] Depending on the outcome of the determination of the Challenges.

Even though the Hearing Officer drew an adverse inference against Krise, he still found the statement by to be protected by Section 8(c) of the Act. Petitioner asserts that an indication that a union victory, in and of itself, will adversely affect terms of employment or job security implies that the employer will retaliate against employees simply for choosing a bargaining representative.

Threats to close the business if a Union wins an election is objectionable conduct warranting invalidation of an election. Daikichi Corp. , 335 NLRB 622, 623-24 (2001). In Daikichi, the Board found that a supervisor's statement to unit employees that the employer "might" close if the union won the election violated Section 8(a)(1) and constituted objectionable conduct warranting the setting aside the election. Id. In Daikichi, the employer "failed to cite any objective facts that would tend to show that if the employees voted to unionize, the Respondent would no longer be able to compete and might have to close for reasons beyond its control." Id. at 624. The Board noted that when an employer "presented no evidence that the Union made any demands at all, let alone demands that, if met, would have the 'demonstrably probable consequence' of driving the Respondent out of business." Id. (citing, inter alia, AP Automotive Systems, 333 NLRB 581, 581(2001) ("employer engaged in objectionable conduct by conveying to employees that union, if selected, would inevitably make exorbitant demands leading to plant closure"). An employer statement predicting a plant closure "phrased . . . as a possibility rather than a certainty" does not nullify the threat or its impact on the election. Id.

The Hearing Officer reliance on Washington Fruit & Produce Co., 343 NLRB 1215 is distinguishable and misplaced based upon the lack of dissemination and severity of misconduct. In Washington Fruit, the employer's conduct involved forcing two employees to wear a "Vote No" T-shirt. Petitioner would submit that Washington Fruit while it mentions the conduct occurred a week before the election, the nexus of the case involves the fact the employer's conduct only involved two employees in a unit of 300 employees, the impact at best in Washington Fruit was determined to be de minimis, by the Board. In the instant case, the statements about walking away and the talk about the Christmas bonus (the subject of Objection 9) was disseminated to 25-30 employees in a unit of approximately 64[11] voters during the critical

[11] The results in the instant election are 24 votes for the Petitioner, 23 votes for the Employer with four outstanding challenged ballots

period. Under the facts of the instant case, the conduct of Krise cannot be considered to be de minimis.

In Peppermill Hotel Casino, 325 NLRB 1202, fn.2 (1998), the Board held that the dissemination to even one voter could have affected results of the election in that case ended in a tie vote. The Hearing Officer ignored the fact that both Krise statements about walking away from the contract with BTSD and the Christmas bonus occurred during the critical period preceding the election. As a general rule, the period during which the Board will consider conduct as objectionable--warranting the setting aside of an election, the so-called "critical period" occurs between the filing of the petition through the date of the election. Ideal Electric & Mfg. Co., 134 NLRB 1275 (1961); Wyandanch Day Care Center, 323 NLRB 39 fn. 2 (1997). In this case, this period fell between September 11 and November 14. Petitioner has shown that the conduct occurred during the critical period. Gibraltar Steel Corp., 323 NLRB 601 (1997). Statements by a high-ranking official of the Employer about a potential walking away from the contract and raising the hopes of the employees of receiving a Christmas bonus had a widespread impact and lasting effect on the employees.

Additionally, the statements made by Krise were made to employees during the critical period when the secret ballot election was originally scheduled to be held on October 23.[12] The fact that the election was delayed by the partial government shutdown should not be an excuse to minimize the impacts of these statements.

With regard to Objection9, the Petitioner notes the Hearing Officer did draw an adverse interest against the Employer for its failure to produce Vice President Tim Krise, who was the primary spokesperson, in meetings held from September 25–November 12. The Hearing Officer still not find that when Krise discussed a Christmas bonus as a benefit for the employees at this STA facility. Barbara Hansell testified Krise, in front of the assembled 20 employees of STA mentioned a Christmas bonus to employees at the Bristol facility (NT-28). The discussion about the Christmas Bonus was raised by Krise, not the employees. The reason for this there was no mention of any bonus in the wage package to STA drivers at this facility (P-5). The wage package information had been distributed to the drivers about a month prior to the filing of the instant Representation Petition. According to Hansell, Krise, during the critical period, post-petition told the employees that the Christmas bonus was given to employees at other STA

[12] The date of the election was delayed until November 14 due to a partial shutdown of the Government.

facilities. Krise then answered specific questions about the bonus by various employees at the meeting (NT-28-29), and Krise's reference to the Christmas bonus was that employees at other facilities enjoyed the benefit (NT 101).

The Hearing Officer totally ignores the fact that the Employer let the genie out of the bottle with its discussions about the Christmas bonus. The Employer mentioned a Christmas bonus to the employees not the other way around. The Employer is in a position to give the employees the Christmas bonus. This action was not a mistake by the Employer, and it was an intentional act by Krise to make an implied promise of benefit to the employees.

Kelly Woods the terminal manager testified that she had no explanation why the bonus was not mentioned in the wage offer (NT 671). Petitioner submits that the Employer at this meeting promised a benefit to its employees, and this conduct interfered with the outcome of the election.

By not having the Employer clearly explain this discussion about the Christmas bonus, the Board should infer that benefits granted or promised during the "critical period prior to a representation election interferes with the employees' free choice. The burden then shifts to the employer to rebut by offering a persuasive explanation, other than the pending election, for the timing of the grant or promise of benefits. E.L.C. Electric Inc., 344 NLRB No. 144 (2005) and cases cited therein. The Employer as noted failed to produce Krise to offer any evidence on this point.

In addition, under Board law, there is no requirement that a promise of benefits in order to be considered objectionable and unlawful conduct needs to explicit. See County Window Cleaning Co., 328 NLRB 190, 196 (1999). In reality, what Employer would be so specific and detailed in violating the Act.

The Board has long held "the subjective reactions of employees are irrelevant to the question of whether there was, in fact, objectionable conduct." Emerson Electric Co., 247 NLRB 1365, 1370 (1980), enfd. 649 F.2d 589 (8th Cir. 1981). Accord: Van Leer Containers, 298 NLRB 600 fn. 2 (1990), enfd. 943 F.2d 786 (7th Cir. 1990); Picoma Industries, 296 NLRB 498, 499 (1989).

The 25-30 employees at this meeting constituted a significant percent of those casting votes, and were far more than enough to have affected the results of this election.

In light of this erroneous application of law and disregard of the relevant facts, the Board should decline to adopt the Hearing Officers recommendation to overrule Objections 8 and 9..

The Hearing Officer in this case clearly departed from Board precedent, when he failed to consider the closeness of the result of the Election when it dismissed all of the Petitioner's Objections to the Election.

The results of this election are extremely close, yet despite this result, the Hearing Officer dismissed all of the Petitioner's Objections. In Cambridge Tool Mfg., 316 NLRB 716 (1995), the Board held the test to determine if a party's misconduct has the tendency to interfere with employees' freedom of choice, the Board considers the following: (1) the number of incidents, (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election; (5) the degree to which the misconduct persists in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party.

As noted, herein the Hearing Officer failed adequately to consider the number of employees in the bargaining unit subjected to the misconduct and the extent of the dissemination of the misconduct amongst the bargaining unit. There is an absence of any misconduct by the Petitioner in the instant case. Lastly, the conduct can be attributed directly to the Employer as follows: 1. the Employer's selection of Williams as an observer and its failure to change the observer given an objection by the Union, 2. the conduct of allowing Williams to wear a shirt with the Employer's logo, 3. the conduct of John Carey interfering with the Petitioner's individual communication with potential voters and 4. the conduct of the Employer's Vice President with his speech about walking away from the contract as well as the discussion of Christmas bonus available at other nonunion facilities.

The Hearing Officer failed to consider the closeness of the results of the election. Each of

the above-described incidents of objectionable conduct had the potential to influencing voters. Since the Hearing Officer failed to apply Board precedent, the Board should decline to adopt the recommendations to overrule the findings of the Hearing Officer with respect to objection 1,2 5, 6, 8 and 9.

Conclusion

For the foregoing reasons, the Petitioner respectfully requests that the Board sustain the objections to the ballots of Matt Smith and Traci Williams and decline to adopt the Hearing Officer's recommendations to overrule Objections 1, 2, 5, 6, 8 and 9.

Respectfully submitted,

Norton H. Brainard, III
Counsel for Petitioner
2833 Cottman Avenue
Philadelphia, PA 19149
215-335-2626
nbesq@msn.com

Date: July 1, 2014

CERTIFICATION OF SERVICE

I, Norton H. Brainard, III do hereby certify that I have filed with the National Labor Relations Board and Ira Sandron of the National Labor Relations Board, and Dennis Walsh, Regional Director and served a true copy upon the Employer's counsel, the foregoing Petitioner's Exceptions to the Report of the Hearing Officer on the Challenges and Objections in Case 04-RC-113131 a copy of Petitioner's Request for review has been filed pursuant to the requirements of Section 102.114(i) of the Board's Rules and Regulations on July 1, 2014

Filed via Electronic Filing

Ira Sandron, Administrative Law Judge
Atlanta Division of Law Judges
401 West Peachtree Street NW
Suite 1708
Atlanta, Georgia 30308-3510

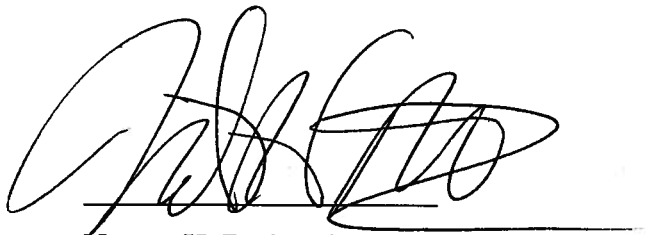
and

Dennis Walsh
Regional Director
National Labor Relations Board
Region 4
615 Chestnut Street, Suite 700
Philadelphia, PA 19106-4413
dennis. walsh@nlrb. goy

And

Served via email

Diane Apa Hauser, Esquire
Paisner, Litvin, LLP
30 Rock Hill Road 5
Bala Cynwyd, Pennsylvania 19004
dhauser@paisnerlitvin.com



Norton H. Brainard, III
Counsel for Petitioner